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CHARLES ELMORE GROOMER

**Supreme Court of the United States**

**OCTOBER TERM, 1946**

**No. 617**

**ESTATE OF WALTER C. BURR, Deceased, JEROME P. BURR and  
CLINTON S. BURR, Executors,**

*Petitioners,*

*vs.*

**COMMISSIONER OF INTERNAL REVENUE,**

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT AND BRIEF IN  
SUPPORT THEREOF**

**HARRY E. RATNER,**  
*Counsel for Petitioners.*



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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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# Supreme Court of the United States

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COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI

*To the Honorable the Chief Justice of the United States  
and the Associate Justices of the Supreme Court of the  
United States:*

The above named petitioners pray that a Writ of Certiorari be issued to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that Court (R. 80) rendered in the above case on July 17, 1946, confirming a decision of the Tax Court entered December 5, 1944 finding a deficiency in the estate tax paid by the petitioners on behalf of their decedent.

### Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended (28 U. S. C. A. Sec. 347(a)).

## The Opinions of the Court Below

The opinion of the Tax Court (R. 33, 34) is officially reported in Docket No. 2500. The Opinion of the Circuit Court of Appeals for the Second Circuit annexed to the Transcript of Record (R. 80).

## Statute and Regulations Involved

### Section 811—Internal Revenue Code

“SEC. 811. GROSS ESTATE.

. . . . .

“(c) TRANSFERS IN CONTEMPLATION OF, OR TAKING EFFECT AT DEATH.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without

such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

. . . . .

### **Summary Statement of Matter Involved**

The decedent, Walter C. Burr, died on April 3rd, 1940, and his Last Will and Testament was admitted to probate on the 9th day of May, 1940, by the Surrogate's Court of Kings County, State of New York (Stip. par. 1; R. 16).

The decedent left him surviving three sons, Clinton S. Burr, Jerome P. Burr and W. Winthrop Burr. The decedent on December 7, 1934, executed three single life insurance contracts with The Prudential Insurance Company of America. The face amount and the premiums of the several policies are as follows:

<i>Face Amount</i>	<i>Single Premium</i>
\$33,334 .....	\$29,959.93
33,333 .....	29,959.03
33,333 .....	29,959.03

(Stip. par. 3; R. 17).

The insurance contracts were issued by The Prudential Insurance Company of America on the condition that such insurance contracts would not be issued unless annuity contract #A8283 was issued. The decedent at the time the insurance contracts were issued was seventy-five years, two months and twenty-nine days of age, and a medical examination was not required as a condition precedent to the issuance of the life insurance policies (Stip. par. 4; R. 17).

The decedent thereafter on December 20, 1934, executed and delivered an assignment of each of the three insurance policies to his three sons, and thereafter, in July, 1936, executed and delivered assignments of all other rights accruing under the insurance contracts to his three sons. The assignments were absolute and irrevocable, and after the assignments of 1936 decedent retained no rights in the insurance contracts (R. 33).

The decedent at the time of the issuance of the insurance contracts and assignments was in reasonably good health for a man of his age, attending to business matters and enjoying motoring trips and walks. Decedent had no serious ailments but was afflicted with mild diabetes and was taking insulin, which treatments were discontinued in the Summer of 1934. Decedent, as part of his plan to take care of himself, had frequent medical examinations. His death was caused by acute uremia due to a prostatic condition. Decedent had anticipated living for many years more. (Memorandum Findings of Fact and Opinion; R. 33.)

### **Question Presented**

Did the Circuit Court of Appeals err in holding that the insurance proceeds in the sum of \$100,165.99, of the insurance contracts (Stip. par. 3; R. 17) are to be included in decedent's gross estate, pursuant to Section 811(c) of the Internal Revenue Code.

### **The Decisions Below**

The Tax Court held that in accordance with the ruling in *Estate of Cora C. Reynolds*, 45 B. T. A. 44, the assignments of the insurance contracts were transfers by the de-

cedent "intended to take effect in possession or enjoyment at or after his death", or "under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the \* \* \* enjoyment of, or the right to the income from, the property" (R. 101). The Tax Court stated that it was unnecessary to make a finding as to whether or not the transfers were made in contemplation of death (R. 101).

The Tax Court found that the assignments by the decedent to his sons were "absolute and irrevocable, and after the assignments of 1936, decedent retained no rights under the insurance contracts. (R. 97, also referred to in the decision of the Circuit Court of Appeals.)

The Circuit Court of Appeals affirmed the decision of the Tax Court and stated that this case is similar to *Helvering v. Le Gierse*, 312 U. S. 531, except for the assignments, which the Circuit Court of Appeals stated did not make sufficient difference to take this case out of the scope of the *Le Gierse* case, *supra*. The Circuit Court of Appeals further precisely stated, "The precise question seems not to have been passed on by any court (R. p. 80, 4th par.).

### **Reasons for Granting of This Writ**

The Writ of Certiorari should be granted because the Court below was in error, and for the reason that as stated by the Circuit Court of Appeals, the precise question has not been passed on by any court. Furthermore it is respectfully submitted that there should be a decision by the highest court on this substantial question of Federal law which affects a substantial number of taxpayers and is of great importance in the administration of the revenue law.

The Tax Court held in the *Cora C. Reynolds* case, *supra*, cited by the Tax Court in the decision herein, and the Circuit Court was in agreement with the contention that the contract for an annuity and a contract on the life of the purchaser of the annuity are "inseparable" and "indivisible". This conclusion is contrary to the decision in the case of *Legg v. St. John*, 296 U. S. 489 (1936). The decision in the *Cora C. Reynolds* case, *supra*, and in the instant case is also contrary to the decisions in *Commissioner v. Peter H. Meyer, Jr., et al.*, 139 Fed. (2d) 256 (C. C. A. 6th) (1943); *Helvering v. Edna E. Meredith*, 140 Fed. (2d) 973 (C. C. A. 8th) (1944); *Estate of Charles R. Dundore, et al.*, entered as a memorandum opinion January 16, 1942, Docket No. 103899; *Mary S. Tonkin, et al., Ex'rs v. U. S.*, 56 Fed. Supp. 817 (1944). These decisions will be discussed in the petitioners' supporting brief.

There is apparently a conflict of decisions on a substantial question which has not been passed on by any court as stated by the Circuit Court of Appeals in its decision.

Wherefore, your petitioners respectfully pray that a Writ of Certiorari issue under the Seal of this Court to review the decision of the Circuit Court of Appeals for the Second Circuit in the instant case.

Dated, New York City, October 8, 1946.

ESTATE OF WALTER C. BURR, Deceased,  
JEROME P. BURR and CLINTON S.  
BURR, Executors,

*Petitioners.*

By: HARRY E. RATNER,  
*Counsel for Petitioners.*

# **Supreme Court of the United States**

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*Petitioners,*

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COMMISSIONER OF INTERNAL REVENUE,  
*Respondent.*

---

## **BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

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### **Question Presented, Statement of Case, Statutes, etc.**

The statement of the question presented, the statement of the case, and the statutes involved are in the petition.

### **Specifications of Error and Summary of Argument**

1. An important and substantial question of Federal Law is involved which has not been, and should be, settled by the Supreme Court.
2. The Circuit Court of Appeals erred in including the proceeds of the insurance contracts in the decedent's gross taxable estate.

## POINT I

**An important and substantial question of Federal Law is involved which has not been, and should be, settled by the Supreme Court.**

The Circuit Court of Appeals precisely stated in its decision, "The precise question seems not to have been passed on by any court." The question involved is most important and substantial and requires and merits the consideration and decision of the highest court. The question presented affects a great number of purchasers of similar contracts of insurance with like fact situations.

## POINT II

**The Circuit Court of Appeals erred in including the proceeds of the insurance contracts in the decedent's gross taxable estate.**

The learned Lower Tax Court in the opinion below stated that the sole issue is the includability of the estate of the decedent under Section 811(c) of the Internal Revenue Code of the proceeds of three single premium "life insurance" policies taken out by the decedent on his own life in conjunction with an annuity contract and which insurance policies were transferred to decedent's three sons by irrevocable assignments executed in 1934 and 1936. The Lower Tax Court stated that in every material aspect, the case herein is substantially on all fours with the Estate of Cora Reynolds, reported in 45 B. T. A. 44 and that on the authority of that case, the transfer or series of trans-

fers by decedent "intended to take effect in possession or enjoyment at or after his death" or "under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the \* \* \* enjoyment of or the right to income from the property." The Tax Court in the Memorandum Findings of Fact found that the transfers were not in contemplation of death and stated in the opinion that the disposition makes unnecessary a finding as to whether the transfers were made in contemplation of death.

The sole question, therefore, is whether the Tax Court and the Circuit Court of Appeals erred in holding that the transfers of the insurance contracts by decedent were "intended to take effect in possession or enjoyment at or after his death" or "under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the \* \* \* enjoyment of or the right to the income from the property." It is respectfully submitted that the instant case is not on all fours with the Estate of Cora Reynolds *supra*. In the *Reynolds* case decedent had created a trust and two insurance policies were transferred to the Trustees to whom the proceeds after the death of decedent were to be paid and the income to be paid to designated beneficiaries after her death. The enjoyment of the proceeds of the insurance by the beneficiaries was deferred through the medium of Trustees. The Trustees were charged with the collection of the insurance proceeds at the death of the insured. The policies issued to the insured herein were two separate policies. While single premium combination of an annuity and life insurance the

policies or contracts were actually separable in fact as well as in form. The income aspect arising from the annuity certainly under the facts was separable from the corpus contained in the life insurance, and the gift of the insurance did not affect the income yield to the annuitant. The absolute, irrevocable and unconditional assignment of the insurance policies by the decedent to his sons resulted in granting to them property rights absolutely independent of the decedent's rights in the annuity contract. The fact that the assignees deferred the exercise of the right to convert the insurance contracts to cash was not bound in any way to the annuity contract, but an exercise of business prudence on behalf of the assignees. In the instant case, the form of the assignments were absolute and irrevocable and after the assignments of 1936, the decedent retained no rights whatsoever under the insurance contract (Memorandum Findings of Fact and Opinion; R. 33). In the instant case, since the assignments were absolute and irrevocable enabling the sons to whom they were assigned to surrender and convert the policies to cash, it is clear that decedent had no rights whatsoever in the insurance policies. Certainly the finding that the transfers were absolute is inconsistent with the ruling that the transfers were "enacted to take effect in possession or enjoyment at or after his death". It would appear that the Lower Tax Court during the course of the hearing made most pertinent observations and displayed a keen appreciation of the factual situation and the legal connotations which were not followed in the decision below in the Lower Tax Court or the Circuit Court of Appeals. In order to present clearly the issues, we will quote a substantial portion of the record which contains the discussion

between the Lower Tax Court and counsel for the respondent. It is respectfully submitted that this discussion clearly shows the weakness of respondent's case and dictates a conclusion other than that reached in the decisions below (R. 39-41):

"Mr. Dahlquist: If the Court pleases, I already stated there were two questions which are presented in this case.

First, is whether the transfer and assignment of the insurance policies involved herein, were made in contemplation of death; and

Secondly, if they were not so made, we believe they were intended to take effect and possession or enjoyment at or after death.

It is the respondent's contention, that the petition—the issue in this case, is fully controlled by the Legeirse decision involving the question of the issuance of insurance policies in conjunction with annuity policies.

In other words, we—

The Court: What did that case hold?

Mr. Dahlquist: It held that where insurance policies were issued, or rather, an insurance policy was issued in conjunction with an annuity policy, and the period, that the insurance would not have been issued unless the annuity policy had simultaneously been issued.

Then, it did not constitute an insurance contract. There was no insurance risk involved in the ordinary sense. It was merely an investment proposition.

The specific question involved in that case was whether the decedent estate was entitled to \$40,000 compensation for insurance. It was decided by Justice Murphy, speaking for the Court, that it did not constitute an insurance contract.

We have the same situation here in, as Counsel has stated and as is set forth in the stipulation of facts, that the three so-called life insurance policies which were issued in this case would not have been issued unless there was also an annuity policy issued and the annuity policy could have been

issued, of course, without the issuance of the life insurance policies.

The Court: I do not understand what that has to do with it. The question we have is whether the property given away was completely given at the time or effective date of it, which is to be at death.

What difference does it make how you pay for it or the circumstances under which you got it?

The question is, how you gave it away, isn't it?

Mr. Dahlquist: Yes, of course, that is our primary contention, that it is a matter here—that the transfer, I mean, the transfer of insurance herein, was either made in contemplation of death or intended to take effect in enjoyment or possession at or after death. That is pursuant to the statute.

The Court: What I am trying to get at is this: As far as the application of Section 811(c) is concerned, you would take the same position if it was an ordinary insurance policy taken out when a man was 21 and assigned at the age when he assigned it?

Mr. Dahlquist: Yes.

The Court: In other words, you say that every insurance policy that is assigned, constitutes a transfer of property to take effect at or after death?

Mr. Dahlquist: I do not think it is necessarily that. It may be that I think the question of circumstances would be very important.

For instance, if a man took out a single premium life insurance policy at the age of thirty and being in good health at the age of 35 he made a complete assignment of that to his wife or to anyone else, I think that we would not attempt to raise the question as to whether that was intended to take effect and enjoyment or possession at or after death.

The Court: Why not?

Mr. Dahlquist: It is a matter of two things, I think. The age at which he does it is one thing and the complete necessity of the assignment is another. I think that the age of the decedent at the time this assignment was made in this case, is extremely important.

The Court: Bearing on contemplation of death? But it would not have any effect upon when the transfer was effected, would it not?

Mr. Dahlquist: No, not on that question.

The Court: That is the phase that I am talking about. I want to get what your point is.

It is whether all insurance policies are ones where the effective date is at death of the assured?

Mr. Dahlquist: Yes, where it does involve insurance policies that would follow, because as insurance policy by itself, its very nature, matures at date of death of the donor, as it would be whether it was a gift or not, as was made or attempted to be made in this case.

The Court: In this policy, could the donees have cashed it in?

Mr. Dahlquist: There is perhaps some dispute on that point, your Honor. The assignment in its form, was complete. Just what would have followed pursuant to that assignment, is a question of interpretation of the assignment."

As stated above, the Tax Court subsequently held that the assignments were absolute and irrevocable (Memorandum Findings of Fact and Opinion; R. 33). In the above questioning and discussion the Tax Court brought out the simple facts that all ordinary life insurance policies contemplate and mature at death. It is, therefore, clear that the test whether a transfer is "intended to take in possession or enjoyment at or after death" could not be applied here as the right of enjoyment vested simultaneously with the transfer by assignments of the insurance contracts to decedent's sons.

Let us next consider the alternative provision whether under the assignment the decedent "retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the \* \* \* enjoyment of or the right of income from the property". As previously stated, the decedent absolutely and irrevocably assigned all his rights

under the insurance contracts in 1936 (page 33, Memorandum Findings of Fact and Opinion) and retained no rights. The assignee's sons of the decedent could have converted to cash the insurance policies at any time so that it would be within a period ascertainable without reference to the decedent's death.

The decision in the case of *Helvering v. LeGierse*, 312 U. S. 531, upon which great emphasis has been placed, does not apply to the instant case. That case ruled that where an annuity policy and life insurance policy were purchased together, with a single premium policy at an advanced age without a medical examination, the insurance contract would not be considered as insurance for the purpose of allowing under Section 302 of the Internal Revenue Code an exemption of the proceeds of life insurance up to the exempt amount of \$40,000. That is not the issue here and as the Lower Tax Court stated, it makes no difference what you call it, but how you gave it away (R. 40).

In the *Cora C. Reynolds* case, *supra*, the Tax Court based the decision on the conclusion that the life insurance contracts and the annuity contract constituted one indivisible transaction. This ruling is at variance with other decisions.

In *Helvering v. Edna E. Meredith*, 140 Fed. (2d) 973 (C. C. A. 8th) 1944, the taxpayer purchased a life annuity and two single premium life contract policies on the same day. The Tax Commissioner considered the policies as one investment and taxed the income therefrom. The Circuit Court of Appeals held that the contracts were not a single investment, but severable contracts. To the same effect

is *Commissioner v. Peter H. Meyer, Jr., et al.*, 139 F. (2d) 256 (C. C. A. 6th) (1943).

The case of *Legg v. St. John*, 296 U. S. 489 (1936) involved a somewhat analagous situation where Legg purchased a life policy and a disability policy at the same time. The question arose whether Legg, a bankrupt, or his trustee in bankruptcy was entitled to the disability payments. Mr. Justice Brandeis stated that the life policy and the disability contract were separate instruments. In that case Legg could only purchase the disability policy if he purchased the life insurance contract. The Court held that the two policies were separate, the life insurance belonged to the bankrupt and the trustee received the monthly disability payments.

In *May S. Tonkins, et al., Executors v. U. S.*, 56 Fed. Sup. 817 (1944), the decedent transferred securities to a trustee and at the same time brought annuity contracts. The trustee bought single premium insurance contracts on the decedent's life, the issuance of the life insurance being predicated on the purchase of an annuity. The Court ruled that even though the insurance company would not have issued the single premium policy without the annuity contract, the face amount of the life insurance should not be included in the gross estate.

It is respectfully submitted that as a practical matter, once the life insurance contract is purchased, and the annuity contract is purchased, they become two separate and distinct contracts, unrelated to each other. As was done in the instant case, the life insurance contracts may be transferred or assigned. What difference does it make if the assignee chooses to cash in the policy or not. The Circuit Court of Appeals in its decision infers that if the sons of

the decedent had actually cashed the insurance policies, the decision of the Circuit Court of Appeals would have been different (R. 6th paragraph of decision of the Circuit Court of Appeals). In furtherance of this observation the Circuit Court of Appeals states that if the sons had actually cashed the insurance policies, the contracts would have been separated, and the insurance company would then have had to make annuity payments out of income and capital from the annuity premium. What difference does it make out of what fund the insurance company would pay, or what method of bookkeeping the insurance company employs. The insurance company had executed certain contracts and had definite obligations based on certain contingencies, and the source and means of payment should have no bearing on the question of payment of estate taxes.

The instant decision of the Circuit Court of Appeals is a declaration to all assignees of life insurance, purchased by single premium at the same time as an annuity policy that unless the assignees cash in the policy prior to the death of the assignor policyholder, the proceeds of the life insurance will be taxed as part of the decedent's gross estate.

Certainly this whole question should not depend on whether the policies were cashed in. It is respectfully submitted that reliance on that reasoning demonstrates the lack of soundness in the decision.

It is respectfully submitted that the decision below should be reviewed by this Court and a Writ of Certiorari should issue because the question involved is substantial, has never been passed on, and is important to the administration of the Internal Revenue Laws and should be settled by this Court.

**CONCLUSION**

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

**HARRY E. RATNER,**  
*Counsel for Petitioners.*

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IN THE

**Supreme Court of the United States**

**OCTOBER TERM, 1946**

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No. 617  
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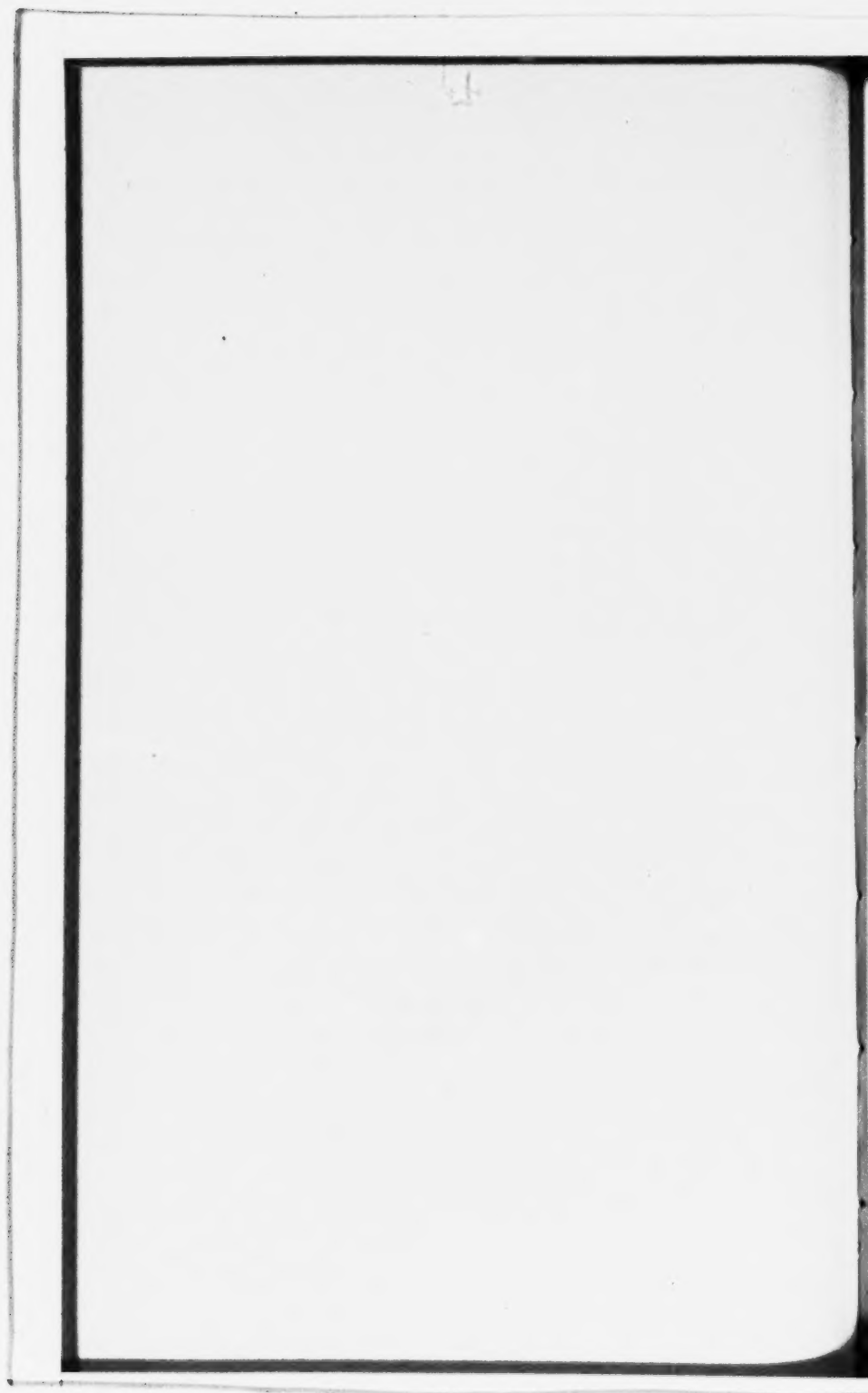
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*v.*

COMMISSONER OF INTERNAL REVENUE.

\_\_\_\_\_  
ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

\_\_\_\_\_  
**REPLY BRIEF FOR THE PETITIONERS**  
\_\_\_\_\_



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1946

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No. 617

ESTATE OF WALTER C. BURR, Deceased, JEROME P. BURR and  
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COMMISSONER OF INTERNAL REVENUE.

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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**REPLY BRIEF FOR THE PETITIONERS**

As was stated in the decision of the Circuit Court of Appeals, there has never been a decision on the particular issue involved herein (R. pp. 80-4). The absence of any decision is one of the compelling reasons urged by the Petitioners, as requiring a decision by the Supreme Court. Because of the absence of a decision on the point herein, all argument is necessarily by analogy and deduction. The Statement of the Respondent that the cases cited by the Petitioners are distinguishable (p. 7 of Respd't's Br.) is meaningless, since the same comment can be made concerning the cases cited by the Respondent. In fact, the very fact that there has been no decision, as specifically and

clearly stated by the Circuit Court of Appeals, on a basic question, of great importance to the public, requires a review by the Supreme Court.

The Respondent contends that conceding the Petitioners' contention that after the assignment of the insurance policies the sons (assignees) became the absolute owners, the result would not be changed. That argument is contrary to the intimation of the Circuit Court of Appeals that if the sons had surrendered the policies for cash, the taxable result would be different. The Respondent then cites cases to support that contention, whereas, the Circuit Court of Appeals specifically stated that there has been no decision on the subject and clearly intimates that if the policies had been cashed in by the sons, the proceeds would not be taxable as part of the gross estate. In other words, the Respondent agrees with the result of the decision, but when it suits its purposes, disagrees with the reasoning of the Circuit Court of Appeals.

The Circuit Court of Appeals also stated that it was not necessary to consider the question of a possible reversion to sustain the tax. At page 6 of the Respondent's brief, Respondent argues that the transfers were not absolute, because the decedent retained the annuity. That contention is contrary to the intimation of the Circuit Court of Appeals that if the policies had been surrendered for cash, the result would be different.

The Respondent then demonstrates the weakness of its position and the necessity for a review by the Supreme Court by advancing an alternate contention that there was a possible reversion, a point not considered by the Circuit Court of Appeals, and states that the Respondent does not abandon that point should certiorari be granted.

The Respondent did not answer the Petitioners' contention that the decision of the Circuit Court of Appeals is a declaration to all assignees of similar life insurance policies, to surrender their policies for cash in the lifetime of the assignor policyholder, or be taxed.

The purpose of the Revenue Act is to collect revenue, so that if the assignees cash in the policies, taxes would not be paid and no revenue paid anyway. Certainly, it is not the public policy to encourage the surrender and cashing of insurance policies to avoid taxation. It is not sound public policy to tax or not, in accordance with whether a policy has been surrendered or not surrendered and cashed.

As stated in Petitioners' brief and reply brief, there is a substantial question, which also involves the public, which has not been decided by the highest court; and the Petition should be granted.

Respectfully submitted,

✓ ALEXANDER HALPERN,  
✓ HARRY E. RATNER,  
*Attorneys for Petitioners.*

November 1946.

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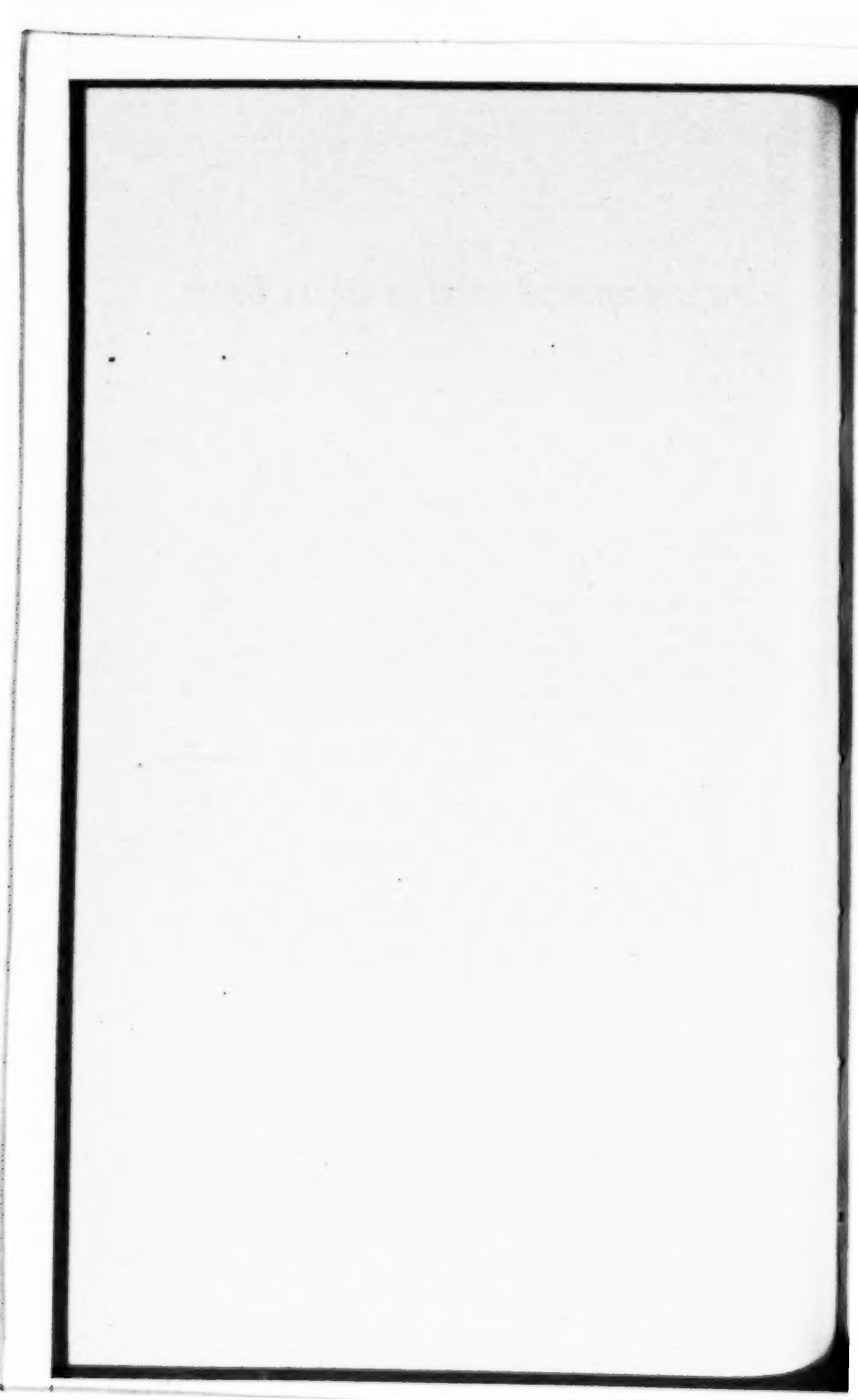
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# **In the Supreme Court of the United States**

OCTOBER TERM, 1946

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No. 617

ESTATE OF WALTER C. BURR, DECEASED, JEROME P.  
BURR AND CLINTON S. BURR, EXECUTORS, PETI-  
TIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND  
CIRCUIT

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

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## **OPINIONS BELOW**

The memorandum opinion of the Tax Court (R. 31-34) is unreported. The opinion of the Circuit Court of Appeals (R. 80-83) is reported in 156 F. 2d 871.

## **JURISDICTION**

The judgment of the Circuit Court of Appeals was entered on July 17, 1946. (R. 83.) The petition for a writ of certiorari was filed on October 16, 1946. The jurisdiction of this Court is

invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTION PRESENTED

In 1934 the decedent purchased three single premium "life insurance" contracts in conjunction with an "annuity" contract. The insurance contracts would not have been issued without the annuity. Almost immediately thereafter the decedent assigned the insurance contracts to his three sons, but retained the annuity. The decedent died in 1940. Are the proceeds of the insurance contracts includible in his gross estate under Section 811 (c) of the Internal Revenue Code?

#### STATUTE AND REGULATION INVOLVED

The statute and regulation involved are set out in the Appendix, *infra*, pp. 10-12.

#### STATEMENT

The Tax Court found the following facts (R. 32-33):

Taxpayer is the Estate of Walter C. Burr, who died testate on April 3, 1940, at the age of eighty years, six months and twenty-five days. The estate tax return was filed with the Collector of Internal Revenue for the First District of New York. (R. 32.)

On December 7, 1934, decedent executed three single premium life insurance contracts with The

Prudential Insurance Company of America. The face amount and the premiums of the several policies were as follows (R. 32):

<i>Face amount</i>	<i>Single premium</i>
\$33,334-----	\$29,959.98
\$33,333-----	29,959.03
\$33,333-----	29,959.03

In conjunction with the purchase of the insurance policies decedent purchased an annuity contract in the face amount of \$2,444.52 on December 10, 1934, at a cost of \$17,622.01, under which decedent was entitled to monthly payments of \$203.71. The insurance contracts would not have been issued without the annuity contract, but the annuity contract would have been issued without the insurance contracts. Each of the insurance contracts contained the usual loan, assignment and cash surrender provisions, and was issued without medical examination. Decedent's three sons, Clinton, Jerome, and Winthrop, were beneficiaries under the insurance contracts. (R. 32.)

On December 20, 1934, decedent executed and delivered an assignment of each of the three insurance policies to his three sons. In July 1936, decedent executed and delivered assignments of all dividend rights accruing under the insurance contracts to his three sons. The form of the several assignments was absolute and irrevocable and, after the assignments of 1936, decedent re-

tained no rights under the insurance contracts. (R. 33.)<sup>1</sup>

At the time of the issuance of the insurance contracts and the assignments thereof decedent was in reasonably good health for a man of his age. He was active in business matters and enjoyed frequent motoring trips and walks. He had no serious ailments. He employed a nurse continually, who acted mainly as a companion to him. He was careful about his diet, principally because of his obesity. He was afflicted with mild diabetes and had been taking insulin, but the insulin treatments were discontinued entirely in the summer of 1934. As part of a plan to take care of himself and live as long as he could, he had frequent physical examinations. His death in April 1940 was caused by acute uremia, due to prostatic obstruction. He had anticipated living many more years and had made plans for his vacation the following summer. Were it not for the development of the prostatic condition, decedent might have lived several more years. (R. 33.)

The Tax Court sustained the determination of the Commissioner that the proceeds of the insurance policies are includible in the decedent's gross estate. (R. 11, 34.) The court below affirmed. (R. 83.)

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<sup>1</sup> We believe that this finding is inaccurate because there was a possibility of reverter to the decedent or his estate, but this consideration is not material here in view of the basis upon which the case was decided.

## ARGUMENT

Both of the courts below, following *Estate of Reynolds v. Commissioner*, 45 B. T. A. 44, held, correctly we submit, that the proceeds of the insurance policies are includible in the decedent's gross estate under Section 811 (c) of the Internal Revenue Code, Appendix, *infra*, which provides specifically for the inclusion in the grantor's gross estate of property, donatively transferred, by trust or otherwise, where he has retained for his life, or for any period not ascertainable without reference to his death, or for any period which does not in fact end before his death, the possession or enjoyment of, or the right to the income from, the property.<sup>2</sup>

The instant situation is plainly within the scope of this Court's decision in *Helvering v. Le Gierse*, 312 U. S. 531, where it was held that a life insurance policy and an annuity policy issued at the same time should be considered together to determine whether there was any real insurance risk, and that so considered there was no such risk. The rationale of the decision in the *Le Gierse* case is that a transaction like the one in-

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<sup>2</sup> These specific provisions came into the law by amendments passed in 1931 and 1932. While they are not retroactively applicable to transfers made prior to their enactment (*Hassett v. Welch*, 303 U. S. 303), they are valid as to subsequent transfers (*Helvering v. Bullard*, 303 U. S. 297). Since the instant contracts were made in 1934, they are subject to the amendments.

volved in cases of this sort is in essence an investment by which the settlor secures a low rate of return in the nature of income for life, together with the undertaking of the insurance company to transfer the proceeds to the objects of his bounty at or after his death. Such an arrangement is comparable in effect to a transfer in trust with a life interest reserved to the grantor. See also *Commissioner v. Clise*, 122 F. 2d 998 (C. C. A. 9th), certiorari denied, 315 U. S. 821; *Mearkle's Estate v. Commissioner*, 129 F. 2d 386 (C. C. A. 3d); *Commissioner v. Wilder's Estate*, 118 F. 2d 281 (C. C. A. 5th), certiorari denied, 314 U. S. 634; *Peek v. United States*, 38 F. Supp. 826 (E. D. Pa.); 1 Paul, Federal Estate and Gift Taxation, Secs. 7.18, 10.08, pp. 352, 498-500.

It is true that the decedent in the instant case assigned the insurance policies to his three sons, but even assuming, *arguendo*, that they became the absolute owners, that would not change the result, for the decedent retained the annuity and that is enough to sustain the tax under the specific provisions of Section 811 (c) above referred to.

The taxpayers urge (Pet. 6, 14-15) that the instant decision and the *Reynolds* case are contrary to *Legg v. St. John*, 296 U. S. 489; *Commissioner v. Meyer*, 139 F. 2d 256 (C. C. A. 6th); *Helvering v. Meredith*, 140 F. 2d 973 (C. C. A. 8th); and *Tonkin v. United States*, 56 F. Supp. 817 (W. D.

Pa.). But we submit that all of those cases are distinguishable. Indeed, *Legg v. St. John* was expressly distinguished by this Court in the *Le Gierse* case (p. 541) on the ground that in the *Legg* case nothing indicated that the one contract would not have been issued without the other; there was no necessary connection between the two. The *Meredith* and *Meyer* cases are income tax cases, and irrespective of whether they may be considered correct it seems clear, as pointed out by the court in the *Meyer* case (p. 258), that the dissimilarity between the object and purposes of the estate tax and the income tax is such that decisions as to one of these taxes are not necessarily controlling with respect to the other. And see *Estate of Sanford v. Commissioner*, 308 U. S. 39, 47-48. The decision of the District Court in the *Tonkin* case, upon which taxpayers rely, was reversed upon appeal, *United States v. Tonkin*, 150 F. 2d 531 (C. C. A. 3d), certiorari denied, 326 U. S. 771, and the tax was upheld.

The taxpayers say (Pet. 15-16) that the sons to whom the insurance contracts were assigned in the instant case could have surrendered them for cash, and that the intimation in the opinion of the Circuit Court of Appeals (R. 82) that such surrender might have changed the taxable result, itself shows that the decision is wrong because there should be no distinction for estate tax purposes between a case where the life insurance con-

tract is surrendered and one where it is not. But it is settled that taxation is controlled by the facts existing at the time of the decedent's death (*Helvering v. Le Gierse*, *supra*, p. 541; *Goldstone v. United States*, 325 U. S. 687, 692-693; *Gwinn v. Commissioner*, 287 U. S. 224, 228-229), and whatever might have been the result if the sons had cashed the insurance contracts here, still they did not do so and in any event they could not have defeated the rights of the decedent under the annuity.

Accordingly, we submit that the ruling of the courts below that the instant transaction was in effect one where the decedent retained a life interest in transferred property is in all respects sound and consistent with all the available authorities. In the circumstances it seems unnecessary to consider our alternative contentions that there was a possibility of reversion sufficient to sustain the tax under *Fidelity Co. v. Rothensies*, 324 U. S. 108, *Commissioner v. Estate of Field*, 324 U. S. 113, and *Goldstone v. United States*, *supra*; and that the insurance contracts and assignments were in fact made in contemplation of death (*United States v. Wells*, 283 U. S. 102; *Allen v. Trust Co.*, 326 U. S. 630). However, these points are not being abandoned, and if certiorari should be granted we would wish to rely upon them as additional grounds upon which to support the decision below.

**CONCLUSION**

The decision is correct; there is no conflict of decisions; and the petition should be denied.

Respectfully submitted.

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*Special Assistants to the  
Attorney General.*

NOVEMBER 1946.

## APPENDIX

### Internal Revenue Code:

#### SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

\* \* \* \* \*

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth \* \* \*. (26 U. S. C. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.18. *Transfers with possession or enjoyment retained.*—Except in the case of

a bona fide sale for an adequate and full consideration in money or money's worth, the gross estate embraces (section 811 (c)) all property transferred by the decedent, whether in trust or otherwise, if he retained or reserved the use, possession, right to the income, or other enjoyment of the transferred property, and if the transfer was made—

(1) At any time after 10:30 p. m., eastern standard time, March 3, 1931, and such retention or reservation is for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period; or

(2) At any time after 5 p. m., eastern standard time, June 6, 1932, and such retention or reservation is for any period mentioned in (1) or for any period not ascertainable without reference to his death.

A reservation for a "period not ascertainable without reference to his death" may be illustrated by a reservation of the right to receive, in quarterly payments, the income of the transferred property where none of the income between the last quarterly payment and decedent's death was to be received by him or his estate; or by a reservation of a life estate following a precedent estate for life or a term of years.

The use, possession, right to the income, or other enjoyment of the property will be considered as having been retained by or reserved to the decedent to the extent that during any such period it is to be applied towards the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit.

If such retention or reservation is of a part only of the use, possession, income, or other enjoyment of the property, then only a corresponding proportion of the value of the property should be included in determining the value of the gross estate.

(See section 81.15.)